In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 902

S. STERN & COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Customs Court appear at 48 Cust. Ct. 430 and 49 Cust. Ct. 167. The opinion of the Court of Customs and Patent Appeals (Pet. App. 1-11) is not yet reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 12, 1963. The petition for a writ of certiorari was filed on March 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

726-697—64

QUESTION PRESENTED

Whether the Customs Court may promulgate a rule of practice which requires a customs brokerage partnership to appear by a member of the bar of that court in litigation concerning imported merchandise which is owned by a corporation on whose behalf the brokerage partnership instituted suit.

STATUTES AND RULES INVOLVED

1. Section 483 of the Tariff Act of 1930, 46 Stat. 721, 19 U.S.C. 1483, provides in pertinent part:

> For the purposes of this title—(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. * * *

2. Section 485(d) of the Tariff Act of 1930, 46 Stat. 724, 19 U.S.C. 1485(d), provides:

> A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

3. Section 1654 of Title 28 provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

4. Section 2071 of Title 28 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

5. Rule 9 of the Customs Court's Rules of Practice provides:

> Appearances.
> Parties may appear and manage their cases personally or by attorney duly admitted under the rules of the court to practice at its bar.

STATEMENT

This action was instituted by petitioner's predecessor (S. Stern, Henry & Co.) in the Customs Court by the filing of a protest under Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, against the assessment of duties on importations of transistor radios and accessories. Thereafter, petitioner and the government proffered to the Customs Court a written stipulation setting forth the facts agreed upon by the parties and necessary for disposition of the protest. The stipulation was signed in petitioner's behalf in the following manner: "S. Stern, Henry & Co. Plaintiff By James B. Herzog Part-

ner."[1] A hearing on the protest was held, at which Herzog entered the appearance on behalf of petitioner.

At that time, the Customs Court *sua sponte* raised the question as to whether, consistent with Rule 9 of its Rules of Practice, Herzog could represent the partnership in the litigation. Upon inquiry of Herzog, who was a layman, it was disclosed that the partnership did not own the merchandise. Rather, as a customs broker, it was serving solely in a representative capacity for the Amerex Trading Corporation which had purchased the radios and accessories from the foreign source and was the owner of the importations. Herzog testified that the partnership would immediately remit to Amerex the entire amount of any refund of customs duties which would result from a successful prosecution of the litigation. It also appeared that the customs entry with respect to the merchandise listed Amerex as the principal for whose account the partnership acted.

On April 24, 1962, the Customs Court entered an order disapproving the stipulation on two grounds: (1) under its Rule 9, *supra*, p. 3, a partnership may appear only by an attorney; and (2) in any event, Herzog's testimony had disclosed that the partnership

[1] As noted by petitioner (Pet. 1), when this action was instituted, there were three partners constituting the firm of S. Stern Henry & Co. After entry of the order of the Customs Court, but prior to argument in the Court of Customs and Patent Appeals, one of the partners died and the partnership name was changed to S. Stern & Company. After entry of the latter court's judgment, James B. Herzog, the partner who signed the stipulation, died. Accordingly, petitioner is now an individual proprietorship and not a partnership.

was acting in a representative capacity and in reality Herzog was endeavoring to appear on behalf of Amerex, the true owner of the imported merchandise. The court's order stated that it was "without prejudice to the resubmission of the stipulation by the appropriate authorized persons." On June 28, 1962, petitioner's application for rehearing was denied.

On December 12, 1963, the Court of Customs and Patent Appeals affirmed. It concluded that the record clearly established that petitioner's maintenance of the protest was solely in a representative capacity and that Rule 9 precluded Herzog, a layman, from appearing in the Customs Court on behalf of Amerex (Pet. App. 10).

ARGUMENT

The petition for certiorari should be denied. As both courts below recognized, the record conclusively establishes that this action was brought by petitioner as the representative of the purchaser and actual owner of the merchandise, the Amerex Trading Corporation. In these circumstances, under Rule 9 of the Customs Court, petitioner was required to appear by an attorney admitted to the bar of that court. The only exception provided in that Rule to the requirement of representation by counsel—*viz.*, that "parties may appear and manage their cases personally"—was reasonably construed by the courts below as having no application where suit is instituted in the name of a nominal plaintiff who is acting solely in a representative capacity for another.

Rule 9 is plainly valid as thus construed by the court promulgating it. Section 2071 of Title 28,

supra, p. 3, expressly confers authority upon the courts of the United States to prescribe rules of practice, consistent with Acts of Congress and the rules prescribed by this Court. Rule 9 is simply a restatement of 28 U.S.C. 1654, *supra,* p. 3, which permits parties without attorneys only to "plead and conduct *their own* cases personally * * *" (emphasis supplied). The court below held that the present proceeding was Amerex's case, not petitioner's, and this conclusion is amply supported by the record.

There is no substance to petitioner's contention that, in applying Rule 9 and 28 U.S.C. 1654, the Customs Court was precluded from looking through form to substance and from giving effect to the fact that petitioner's role was merely that of a broker prosecuting a claim on its principal's behalf. Petitioner points (Pet. 12–13) to Sections 483 and 485(d) of the Tariff Act, 19 U.S.C. 1483 and 1485(d), *supra,* p. 2, which make a consignee such as petitioner liable for the customs duty. Neither of these sections, however, supports petitioner's apparent belief that, for all purposes, a nominal consignee of imported merchandise must be regarded as the owner. On the contrary, Section 483 provides that the consignee shall be deemed the owner only for the purpose of insuring that the custom duties are paid. Cf. *Meredith* v. *United States,* 13 Pet. 486. This does not mean, as petitioner suggests (Pet. 9–10), that the petitioner is now barred from suing in its own name as the consignee of the merchandise imported. Section 483 makes petitioner a party with sufficient interest to conduct litigation. Rule 9 simply provides

that this litigation must be conducted on behalf of petitioner by an attorney, although the true owner could proceed *pro se*.

Not only is there nothing in the Tariff Act requiring that a nominal consignee be treated as the owner of the imported merchandise who is entitled to conduct litigation *pro se* by virtue of 28 U.S.C. 1654 and Rule 9, but it is scarcely likely that Congress would authorize the widespread practice of law by customs brokerage firms comprised of laymen. Under petitioner's theory, any customs broker could obtain the right to represent his principal in the Customs Court and the Court of Customs and Patent Appeals through the simple expedient of entering the merchandise in the name of the broker rather than that of the principal.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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APRIL 1964.

[2] In view of these considerations, there is no need for this Court to consider the alternative ground assigned by the Customs Court: *i.e.*, that a partnership must always be represented by counsel. Moreover, this question is probably moot since petitioner is now a sole proprietorship. See n. 1, *supra*, p. 4.

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